MOTION FILED
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No. 00-1024

In The

Supreme Court of the United States

NEIL C. GORDON, as Chapter 7 Trustee for the Estate of Slaughter Company & Associates, Inc.,

Petitioner,

v.

ALCATEL CONTRACTING (N.A.), INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

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QUESTION PRESENTED

Whether the 11th Circuit erred by creating an open-ended rule which applies equitable principles to the treatment of an unsecured creditor's late-filed proof of claim in a Chapter 7 bankruptcy proceeding which is prejudicial to third-parties.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

The National Association of Bankruptcy Trustees respectfully petitions this Court for leave to file the annexed brief Amicus Curiae pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this Amicus brief. However, the Respondents have refused to consent to the filing of the Amicus brief.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Bankruptcy Trustees (NABT) is a non-profit organization formed for the purposes of improving the administration of bankruptcy proceedings. The NABT was founded in 1982. The NABT has approximately 1,400 members of whom 1,000 are bankruptcy trustees. It is the responsibility of a bankruptcy trustee, under the supervision of the United States Trustee's Office, to administer bankruptcy proceedings through the discovery and liquidation of assets, to determination of and payment of proper claims. The issues before this Court are of extreme interest to all members of

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[1] Petitioner's consent has been filed with the Clerk of Court.

the Association in that it directly impacts on their ability to perform their statutory duties.

Respectfully submitted by:

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES[2]

The National Association of Bankruptcy Trustees respectfully submits this brief Amicus Curiae.

IDENTITY AND INTEREST OF AMICUS CURIAE

The identities and interests of Amicus Curiae are set forth in the preceding motion and are adopted herein.

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and jurisdictional statement.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

REASONS FOR GRANTING CERTIORARI

The opinion of the 11th Circuit, adopting the decision of the District Court, sets forth an open-ended ruling

[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

which could prohibit bankruptcy trustees from complying with their statutorily imposed duties. The decision of the 11th Circuit directly contravenes the stated policies underlying the Bankruptcy Code.

28 U.S.C. §581 et seq. creates and sets forth the rules governing the United States Trustee's Office. 28 U.S.C. §586 states "(a) each United States Trustee, within the region for which United States Trustee is appointed, shall – (1) establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under Chapter 7 of Title 11; . . . " 28 U.S.C. §586 further mandates the supervision of panel trustees to ensure conformance with provisions of the Bankruptcy Code as set forth in United States Code Title 11, the Federal Rules of Bankruptcy Procedure, and the Statement of Operational Policy promulgated by the Executive Office for the United States Trustee.

11 U.S.C. §704 states "the trustee shall – (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible for the best interest of the parties in interest; . . . (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper; . . . (6) make a final report and file a final account of the administration of the estate with the court and with the United States Trustee."

The legislative history of 11 U.S.C. §704 states "the trustee's principle duty is to collect and reduce to money the property of the estate for which he serves, and to close out the estate as expeditiously as is compatible with the best interest of the parties in interest". House Report

No. 95-595, 95th Cong., 1st Sess. 379 (1977); Senate Report No. 95-989, 9th Cong., 2d Sess. 93 (1978). The Court's interpreting §704(1) have held it is the primary duty of the trustee to close the estate expeditiously and that the other clauses of this section are merely directory as to what the trustee shall do in accomplishing this main object and purpose. See *In re: Hutchinson*, 5 F.3d 750 (4th Cir. 1993); *In re: Riverside-Linden Inv. Co.*, 925 F.2d 320 (9th Cir. 1991).

This duty is also required by implication from the other provisions of the Code and the Federal Rules of Bankruptcy Procedure, especially Federal Rule of Bankruptcy Procedure 1001. Rule 1001 provides that the Rules shall be construed to secure the just, speedy, and inexpensive determination of every case.

The 11th Circuit decision in this case would act to prohibit the Legislative intent from being accomplished and to prevent the Trustees from performing their statutorily proscribed duties. The 11th Circuit decision is apparently based on equitable considerations which this Court has previously ruled should not be considered in applying the plain language of the statutes and rules comprising the Bankruptcy Code.

For example, Bankruptcy Rule 4003(b) states that the trustee or any creditor may file objections to a list of property claimed as exempt within thirty days after the conclusion of a meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the Court. In *Taylor v. Freeland and Kronz*, 112 S.Ct. 1644 (1992), the bankruptcy trustee failed

to file an objection within the thirty day period. The Trustee later filed an objection due to the fact that the debtor stated no proper legal basis for claiming exemptions. In rejecting the trustee's argument, this court refused to apply the equitable consideration that the trustee asserted and held that the plain wording of the statute prohibited a late filing of an objection.

In *Pioneer Inv. Services Co. v. Brunswick Assoc. Limited Partnership,* 507 U.S. 380 (1993), this Court refused to apply equitable principles to create an excusable neglect standard for failure to timely file a proof of claim. 11 U.S.C. §726 as well as Rules of Bankruptcy Procedure 3002(c) and 9006(b)(3) provide no basis to permit a late filed proof of claim to be treated as timely filed as furthering the legislative policy of prompt closure and distribution of the debtor's estate. The 11th Circuit's application of equitable principles contravenes the plain meaning of these Statutes and Rules and are in direct contradiction of this Court's prior rulings and the legislative intent behind the Bankruptcy Code.

The 11th Circuit's decision further fails to set forth any standards or tests to be applied rendering the determination to allow a late filed claim as being deemed timely filed. 11 U.S.C. §704(9) requires the trustee in a chapter 7 case to make a final report and a final account of the administration of each case. The Statement of Operational Policy promulgated by the Executive Office of the United States Trustee is contained in the Handbook for Chapter 7 Trustees, the applicable portions of which are attached as an Appendix to this Brief.

Pursuant to the Operational Policy, final report and final account prepared in conjunction with 11 U.S.C. §704(9), must be submitted to United States Trustee for review before filing with the Court. "The Asset Final Report must be prepared as soon as all assets have been liquidated, all monies collected, and the bar date has expired for creditors to file claims, and all claims reviewed or determined by the court." Handbook for Chapter 7 Trustees (April 1992), Page 56. The trustee is required to remove all funds from interest bearing accounts and perform various other tasks. Once the U.S. Trustee's office has determined that the trustee has properly concluded administration of estate property, the Report is forwarded to the Court for approval. Upon being filed with the Court, the Clerk's office mails a copy of the Notice of Filing of the Final Report to all creditors at which time the creditors may review the Report to determine what funds they will receive and whether they feel an objection is appropriate. If no objections are filed, or after court consideration of an objection, the court enters appropriate orders authorizing distribution and payments. These payments are made in conjunction with the statutory scheme set forth in 11 U.S.C. §726.

The record below is unclear as to the status of the bankruptcy case at the time the late filed claim was allowed. Should this Court determine equitable principles should be permitted to be applied in allowing a late filed claim, those equitable principles should equally be applied in determining at what stage of the proceedings the prejudice to creditors in the estate outweighs the prejudice to the party filing the claim should such claim not be allowed. For example, once a Trustee's Final

Report has been reviewed by the Court and approved, should a creditor still be able to file a claim, which claim, of necessity, would mandate complete recalculation of the Report and the recommencing of the filing process? Should creditors, who have been informed of a distribution they are to receive, have to then be told that that distribution will not be forthcoming, rather some lesser amount? Should the delay of the process after the money has been moved out of an interest bearing account prior to the filing of a Report be permitted? These are all questions the 11th Circuit failed to address. The open-ended Rule allowing equitable principles to be used to allow a late filing of a claim to be deemed timely filed will serve to create prejudice to those parties who complied with the Rule and timely filed a claim. Such a Rule does not promote finality as required by the Bankruptcy Code, but rather serves to promote delay as well as increased costs and expense. The 11th Circuit's ruling interferes with the Trustee's ability to administer an estate effectively.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to issue a Writ of Certiorari to review the decision of the 11th Circuit because the decision is in contravention of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, Statement of Operational Policy of the United States Trustee's Office and in direct contravention of prior decisions of this Court. The 11th Circuit's ruling hampers the ability of the Chapter 7 Trustee to effectively administer the bankruptcy estate and renders

the plain meaning of 11 U.S.C. §726 and Bankruptcy Rules 3002 and 9006 meaningless. Accordingly, the 11th Circuit must be reversed.

Respectfully submitted,

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APPENDIX A

Handbook For Chapter 7 Trustees

* * *

E. ASSET CASE CLOSINGS

1. FINAL REPORT (PRE-DISTRIBUTION REPORT)

Section 704(9) requires a trustee in a chapter 7 case to make a final report and final account of the administration of the case. The final report (and final account) should be submitted to the United States Trustee for review before filing it with the court. While individual districts may have local court rules or policies concerning the asset final report, basic criteria apply to the closing of cases.

The asset final report must be prepared as soon as all assets have been liquidated, all monies collected, the bar date has expired for creditors to file claims, and all claims reviewed or determined by the court. Obtaining a ruling on claims by the court prior to the filing of a final report is the most expedient manner of proposing proper distribution.

In order to compute the amounts to be disbursed, all funds should be transferrerd from any interest bearing account to the estate checking account (unless otherwise provided in your local district). If funds are invested in a Certificate of Deposit or an investment that has not yet matured, it may be in the best interest of the estate to delay final closing until it has matured. Trustees should not, however, make an investment that will predictably delay closing.

All outstanding applications for profesional compensation and expenses should also be filed along

with the final report. The final report will enable the United States Trustee and any other party in interest to determine how the trustee proposes to disburse the funds.

The final report should summarize all actions taken by the trustee to administer the case. Each report must:

- Describe specifically the disposition of each estate asset (as listed in the debtor's schedules or otherwise discovered). Form 1, the Estate Property Record and Report, may be included in the final report to meet this requirement.
- Report all financial transactions by the trustee. Form 2, the Cash Receipt and Disbursement Record, may be included in the final report to meet this requirement.
- Request payment of trustee's commission and all trustee expenses and any unpaid professional fees and expenses.
- Report the trustee's actions on claims or their disposition.
- Propose distribution to creditors according to § 507 and § 726.
- Attach original bank statements and original canceled checks (from estate accounts) received by the trustee during the case.

In preparing a final report or order of distribution, the trustee must follow the payment priorities established by § 507 and § 726. Claims must be paid in the order they appear in that section. The order of payment is as follows:

- First, costs of administration allowed under § 503(b), including trustee's fees, professional

fees, and certain post-petition claims, and costs and fees assessed under chapter 123 of title 28. In a case converted from chapter 11, the trustee will be advised by the United States Trustee of any unpaid fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6) during the pendency of the chapter 11 proceeding. These fees are not subordinated to the chapter 7 administrative expenses under § 726(b) as are the administrative expenses incurred in the chapter 11 case.

- Priority claims are paid next. Each category of priority claims under each paragraph of § 507 must be paid in full before moving to the next paragraph.
- Unsecured creditors. Within any class of claims, if insufficient funds exist to pay all claims in full then, the balance of funds are prorated among that class of creditors. Proration is made as follows:
  - Calculate the total amount of the claims in the category to be paid.
  - The percentage of the dividend is calculated by dividing the amount of claims into the balance on hand. Multiply that percentage by the amount of each claim allowed to find the amount to be paid on that claim. The formula is:

$$\frac{\text{Balance on Hand}}{\text{Amount of Claims}} = \% \times \frac{\text{Amount Claimed}}{} = \text{Dividend Amount}$$

The United States Trustee reviews the final report in order to assess whether the trustee has properly and completely administered estate property. Upon completion of this reveiw, the United States

Trustee forwards the final report to the court. If there is a dispute between the United States Trustee and the trustee concerning the report, the final report will be filed and the dispute resolved by hearing before the court.

After the trustee's final report has been reviewed by the United States Trustee Office, and filed with the court, the clerk's office should mail a copy of the notice of the filing of the final report to all creditors. Essentially, the notice represents a notice and hearing procedure which informs creditors that the trustee's final report for the case is on file in the clerk's office, that the trustee and other professionals have applied for compensation in given amounts, that the money on hand will be distributed to creditors in accordance with the bankruptcy priority laws, and that the creditors have a right to object to the trustee's report.

If no objections are filed or, upon objection, after court consideration, the court will enter appropriate orders authorizing distribution and payments.

2. DISTRIBUTION OF FUNDS

Upon receipt of the court's order and after any applicable appeal period has expired, the trustee should immediately make disbursements. All disbursements should be made by check from the estate accounts. All checks must be signed by the trustee only.

All checks should include the following:

a. the account number assigned by the bank (this number should be pre-printed on the numbered checks provided by the bank);

b. the caption of the bankruptcy case (e.g., Estate of Mary Smith, Debtor, John Doe, Trustee, case number 86-000);

c. the name of the payee;

d. the amount;

e. the trustee's signature; and

f. a statement advising that the check will be void if not cashed within 90 days.

Checks should be forwarded to the addresses furnished by the creditors on their proof of claims.

Under FRBP 3010, all dividends of less than $5 must be treated as unclaimed funds and turned over the [sic] the clerk of the court. The trustee must furnish the name of the creditor, the creditor's last known address, and the amount of the dividend to the clerk's office. If there is more than one such dividend, only one check made payable to the clerk is necessary, listing the appropriate claim numbers on the check.

If any checks are not negotiated by creditors within 90 days, either the checks are void by operation of the endorsement or the trustee may need to issue a stop payment request on said checks (depending on the procedures established by the trustee with his bank). The amounts represented by these checks are to be treated as unclaimed dividends and deposited with the clerk, according to FRBP 3011, along with a transmittal letter to the court indicating the last known address of the creditor.

However, in those instances where a creditor returns funds to the trustee due to the fact that

the creditor has been paid from another source, the trustee should then redistribute these funds to other creditors according to the priorities set forth in the Bankruptcy Code, § 507 and § 726.

3. FINAL ACCOUNT (POST DISTRIBUTION REPORT)

Once all checks, including those issued to the clerk, have cleared the trustee's account, the trustee should present a final account (post distribution report) to the United States Trustee for review. The final account should indicate that the trustee has completed distribution according to the court's order and no longer holds any estate funds or property. An original bank statement, which shows a -zero- balance, and all canceled checks, should be attached to the final account.

A trustee may request his discharge and the closing of the case in his final account or by other pleadings filed with the final account.

Upon review of the distribution, the United States Trustee will forward all canceled checks and zero balance statements to the clerk to enable the court to officially close the case and discharge the trustee. If the clerk does not accept canceled checks, the United States Trustee will return them to the trustee who must retain them for the two-year period specified in § 322(d) of the Bankruptcy Code, or as otherwise required by the Internal Revenue Service if for a longer period.

In the case closing area, specific local procedures and forms may vary. The trustee should consult with the United States Trustee and receive training prior to the submission of case closing documents.

F. REOPENING OF CLOSED CASES

Occasions may arise when a closed case will have to be reopened to administer unreported or recently discovered assets. The filing of a final report or a final account by a trustee does not close a case, it can only be closed by court order. If a new asset is discovered before a case is closed, the trustee may notify the United States Trustee and the clerk and amend the final report and final account. However, if the court has officially closed a case, the trustee will have to file a motion to reopen the case and state the reasons for reopening.